U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

INDEX

File: [redacted]

Date:

MAR 22 1999

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Nancy A. Peterson, Esquire
Immigrant Law Center of Minnesota
179 East Robie Street
St. Paul, Minnesota 55107

ON BEHALF OF SERVICE: Kristin W. Olmanson
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] - Convicted of two or more crimes involving moral turpitude

Lodged: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Asylum; withholding of removal

The respondent has appealed from an Immigration Judge's decision finding him removable under the above-referenced grounds, finding him ineligible for withholding of removal under section 241(b)(3)(B) of the Immigration and Nationality Act ("Act"), and ordering him removed from the United States to Cambodia. He argues that the Immigration Judge erred in two respects: (1) by finding him removable as an aggravated felon because his statutory rape offenses should not be considered "crime[s] of violence" under the Act; and (2) by pretermitting his application for withholding of deportation on the basis that his prior convictions were for "particularly serious" crimes. We reject both contentions and affirm the decision of the Immigration Judge.

The respondent does not contest his removability for having been convicted of two crimes involving moral turpitude under section 237(a)(2)(A)(ii) of the Act. The record establishes that the respondent was convicted on three separate occasions for statutory rape under Minnesota law, specifically "criminal sexual conduct" in the "third degree" under Section 609.344 § 1(B) of the Minnesota criminal statute. The three offenses occurred within a 3-year period when the respondent was in his early twenties: (1) on April 19, 1994, he received a sentence of 18 months imprisonment (the execution of which occurred on December 18, 1996) for an incident occurring

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in April 1994, when the respondent was 20 years of age, involving a 15-year-old girl; (2) on November 19, 1996, he was sentenced to 3 years imprisonment for incidents occurring prior to June 1996, when he was 22 years of age, involving a 15-year-old girl; and (3) on December 18, 1996, he was sentenced to 3 years imprisonment for an incident occurring in July 1995, when he was 21 years old, involving a 14-year-old girl. The sentences were to be served concurrently.

This Board previously has held that a conviction for statutory rape constitutes a "crime of violence" under section 101(a)(43)(F) of the Act and, therefore, is an aggravated felony. See Matter of B-, Interim Decision 3270 (BIA 1996). As we noted in that decision, we are obliged to look to the statutory definition of the crime at issue, not the underlying circumstances of the conviction, in deciding whether a crime should be considered a "crime of violence." Id., at 4. Despite the respondent's contentions on appeal, we are not convinced that the Minnesota statute implicated in this case differs so substantially from the Maryland statute in Matter of B-, supra, that it does not constitute a "crime of violence." As the respondent points out on appeal, the Minnesota statute requires that the victim be between the ages of 13 and 16 (whereas the Maryland statute involves victims of less than 14 years), implicates criminal defendants who are only 2 years older than the victim (whereas the Minnesota statute requires a 4-year age difference), and requires only "sexual penetration" (whereas the Maryland statute requires "vaginal intercourse"). These differences, while significant, are not so serious that our reasoning in Matter of B-, supra, should not be applied to the statute in this case. Our approach is to take a "common sense view of a sexual abuse law" such that "whenever an older person attempts to sexually touch a child under the age of consent, there is invariably a substantial risk that physical force will be wielded to ensure the child's compliance." Id., at 5. Such an approach, applied to the instant case, yields the same result: the law which the respondent violated involved an older person touching a child sexually. This implicated a substantial risk that force would be used. Thus, the crime is a "crime of violence" under section 101(a)(48)(A) of the Act. Authority from the judicial circuit in which this case arises has reached the same conclusion when deciding whether statutory rape is a "crime of violence" under the federal sentencing guidelines. See United States v. Bauer, 990 F.2d 373 (8th Cir. 1993). We agree with the Immigration Judge that the respondent is removable as an aggravated felon under section 237(a)(2)(A)(iii) of the Act.

The respondent further contends that, even if found to be removable as an aggravated felon, he nevertheless should be given the opportunity to apply for withholding of deportation. He argues that he does not fit within that portion of section 241(b)(3)(B)(ii) of the Act which states that an alien is ineligible for withholding if "the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States."

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Given that the respondent was sentenced to less than 5 years for his felonies,[1] we agree with the respondent inasmuch as we are bound to examine the particular circumstances of his case in deciding whether his prior convictions constitute crimes that are "particularly serious" and which preclude him from applying for withholding of removal. See Matter of S-S-, Interim Decision 3374 (BIA 1999). However, we disagree that such an examination leads to the conclusion that his crimes are not "particularly serious" under the Act.

When judging the seriousness of a crime, we look to factors such as the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most important, whether the type and circumstances of the crime indicate that the respondent is a danger to the community. Matter of S-S-, supra; Matter of Frentescu, 18 I&N Dec. 244 (BIA 1982), modified, Matter of C-, 20 I&N Dec. 529 (BIA 1992); Matter of Gonzalez, 19 I&N Dec. 682 (BIA 1988). We also have held that once an alien is found to have committed a particularly serious crime, there is no need for a separate determination of whether the alien is a danger to the community. See Matter of K-, 20 I&N Dec. 418 (BIA 1991), aff'd, Kofa v. INS, 60 F.3d 1084 (4th Cir. 1995); see also Matter of Q-T-M-T-, Interim Decision 3300, at 11 (BIA 1996).

The respondent's prior convictions constitute a "particularly serious crime" under section 241(b)(3)(B)(ii) of the Act, both individually and cumulatively.

Individually, his conviction involving the 14-year-old victim, in and of itself, constitutes a "particularly serious crime," as it appears that the incident was, in some measure, non-consensual (Exh. 2, at 37). It is even acknowledged by a Licensed Psychologist from the Minnesota Department of Corrections that the respondent "has a total of 3 sex offense convictions, one of which involved force." See Add. 3, Office Memorandum, dated May 12, 1998, from Stephen J. Hout (submitted in support of respondent's appeal). Even accepting the respondent's contention on appeal that consent is irrelevant to a statutory rape conviction under Minnesota law, this fact does not preclude us from considering such use of force in deciding whether a crime is "particularly serious" under section 241(b)(3)(B)(ii) of the Act. This use of force is a "circumstance" surrounding the crime which demonstrates its particular seriousness. We further find no support in the record for the respondent's contention that the respondent's victims, including the 14-year-old girl, did not suffer "injury" as a result of his criminal actions. As pointed out by the Immigration Judge (I.J. at 5), the 14-year-old victim suffered sleep deprivation and a drop in school performance. She switched schools in an attempt to overcome the trauma of the incident. We cannot imagine how a girl of such tender years could not be considered to have suffered "injury" as a result of the respondent's criminal behavior -- behavior which involved the use of force. The respondent has not, for example, provided evidence that

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1 Because the sentences were not to be served consecutively, their separate terms may not be combined to reach the 5-year imprisonment threshold necessary for them to be considered "particularly serious" under section 241(b)(3)(B)(ii) of the Act. Matter of Fernandez, 14 I&N Dec. 24, 25 (BIA 1972).

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his alleged former "girlfriends" currently view his treatment of them as anything other than abusive in nature. We also observe that the length of the sentences, each of 3 years duration, is a good deal longer than the 1-year minimum necessary to establish his removability as an aggravated felon.

Finally, we also find the respondent's cumulative criminal history to constitute a "particularly serious crime" under the Act. The respondent was charged for three separate offenses, each involving different victims and each implicating the same statutory provision of Minnesota law. The respondent's last offense was committed shortly after he was put on probation for third degree criminal sexual conduct; this last offense was committed while he was in treatment and while being supervised on probation. We find such repeated criminal behavior to indicate that the respondent's convictions for violating Minnesota's statutory rape provisions were "particularly serious" under section 241(b)(3)(B)(ii) of the Act. We do not find that the respondent's end of confinement, apparently split decision, risk assessment report warrants a remand of this case for further consideration, given the facts of record.

We therefore conclude that the respondent is ineligible for withholding of removal under section 241(b)(3)(B) of the Act.

For the foregoing reasons, the appeal will be dismissed.

ORDER: The appeal is dismissed.

FOR THE BOARD